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In The

Supreme Court of the United States

October Term, 1995

CERTAIN REAL PROPERTY LOCATED AT 11869 WESTSHORE DRIVE, PUTNAM TOWNSHIP, LIVINGSTON COUNTY, MICHIGAN TOGETHER WITH ALL ITS FIXTURES IMPROVEMENTS AND APPURTENANCES,

Petitioner,

KATHRYN DUPRIE, NEAL DUPRIE, D&N BANK,

Claimants,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should grant certiorari to resolve a split in the Circuit Courts of Appeals as to the appropriate test to be used to determine whether a civil forfeiture is excessive under the Excessive Fines Clause of the Eighth Amendment and which was undecided in the Court's opinion in *Austin v. United States*, ___ U.S. ___, 113 S. Ct. 2801 (1993).

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OPINIONS BELOW

On April 18, 1994, the United States District Court for the Eastern District of Michigan, Southern Division, entered an Order granting Respondent's Motion for Summary Judgment (Appendix C). Petitioner filed a timely appeal from this decision and, on December 6, 1995, the United States Court of Appeals in a published opinion found at 70 F.3d 923 (6th Cir. 1995), affirmed the United States District Court. (Appendix B). Petitioner filed a Motion for Rehearing with Suggestion for Rehearing En Banc, which was denied by the Court on January 24, 1996. (Appendix A).

STATEMENT OF JURISDICTION

The Court's jurisdiction to review the post judgment order of the United States Court of Appeals for the Sixth Circuit affirming the District Court's Order granting Respondent's Motion for Summary Judgment is invoked pursuant to 28 U.S.C. § 1254(1).

Petitioner brought a Motion for Rehearing with Suggestion for Rehearing En Banc, based upon Rule 35 of the Federal Rules of Appellate Procedure and Rule 14 of the Rules of the United States Court of Appeals for the Sixth Circuit. The Petition for Rehearing with a Suggestion for Rehearing En Banc was treated as a Petition for Rehearing by the Court of Appeals for the Sixth Circuit. This Petition for Writ of Certiorari is timely filed within ninety (90) days of the denial of the Petition for Rehearing. Rule 13.3 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

A. Procedural History

On or about June 17, 1992, the Respondent filed in the United States District Court for the Eastern District of Michigan, Southern Division, a Complaint for Forfeiture and Search Warrant with Affidavit in support, seeking the seizure and forfeiture of certain real property located at 11869 Westshore Drive, Putnam Township, Livingston County, Michigan. The seizure and complaint were executed shortly thereafter. On June 29, 1992, Kathryn Duprie and Neal Duprie filed separate verified claims to the property, and an Answer to the Complaint for Forfeiture with Affirmative Defenses. On July 30, 1992, Claimant, D&N Bank filed a Verified Claim and Answer.

On November 1, 1993, Claimants, Kathryn Duprie and Neal Duprie filed a Motion to Dismiss the Complaint for Forfeiture. On November 2, 1994, Respondent filed a Motion for Summary Judgment. The Respondent filed a response to Claimants' Motion to Dismiss on November 15, 1993.

On March 2, 1994, the court held a hearing on the motions filed by the Respondent and Petitioner. On March 15, 1994, Respondent, at the court's direction, filed a supplemental affidavit in support of its Motion for Summary Judgment. On April 5, 1994, the court filed a Memorandum Opinion or Order granting Respondent's Motion for Summary Judgment (Appendix D). On April 18, 1994, the Court entered a Judgment in favor of Respondent and against Petitioner and Claimants. (Appendix C).

On June 3, 1994 Claimants filed an appeal.

On December 6, 1995 the Court of Appeals for the Sixth

Circuit entered an Opinion and Order affirming the District Court's Order (Appendix B). Petitioner filed a Petition for Rehearing with Suggesting for Rehearing En Banc, which was denied on January 24, 1996. (Appendix A).

B. Statement of Facts

On or about June 17, 1992, Respondent filed and served upon Petitioner and Claimants a Complaint for Forfeiture and a seizure warrant. According to the affidavit in support of the seizure warrant, in April, 1992, City of Livonia, Michigan police officers received information from a confidential informant that claimant, Neal Duprie, was selling multi-pounds of marijuana. In May, 1992 a controlled purchase of marijuana from Neal Duprie to the confidential informant was made at Neal Duprie's place of employment. In June, 1992 a controlled purchase of marijuana using pre-recorded funds was made from Mr. Duprie on the "curtilage of 11869 Westshore Drive". After the purchase was made, a state search warrant was obtained and the premises, including outbuildings were secured and searched. Inside the residence was found a small amount of marijuana, "roaches" and seeds, hunting weapons, $4,800 in a desk in the study and $3,580, some of which were pre-recorded funds in a safe in the bedroom. Approximately sixteen pounds of marijuana were seized from a pole barn located on a separate piece of property away from the house, and separated from the residence by a public roadway.

Both Claimants, Kathryn Duprie and Neal Duprie arrived at the residence while the search was underway. Both were placed under arrest and their vehicle searched. A small amount of marijuana was found in the vehicle.

Both Claimants were charged with violating Michigan's narcotic laws, MCLA § 333.7401 *et seq*. Forfeiture proceedings were initiated by the United States Attorney's Office. Claimant,

Neal Duprie, pled guilty to a felony charge of violating Michigan's narcotic laws and was sentenced to eight months custody and a probationary sentence. Claimant, Kathryn Duprie plead guilty to a misdemeanor charge of violating Michigan's narcotic laws and was given a fine.

In response to the complaint for forfeiture, both Claimants filed individual verified claims of interest in the property and an answer to the complaint.

In the answer to the complaint, Claimants asserted that the property was divisible and that each parcel should be treated separately under the law.

It was undisputed that Petitioner Real Property consists of three separate parcels of land situated around an inland lake in a rural part of Michigan, north of Ann Arbor. The parcel upon which the residence was situated abutted the lake and the view from the residence overlooked the lake. A small parcel containing a well which serviced the residence was across the street from the parcel on which the residence was situated. Separated from the two parcels was a third parcel on which was built a pole barn. (The government never alleged and there was never any proof that any of the three parcels were purchased with proceeds from the sale of controlled substances.)

On November 1, 1992, Claimants filed a Motion to Dismiss Plaintiff's Complaint for Forfeiture, arguing that the property was severable and if severed forfeiture of the property with the pole barn was proper, but to order forfeiture of the residence would violate the Eighth Amendment to the United States Constitution.

On November 2, 1992, the Respondent filed a Motion for

Summary Disposition which did not address the severability of the property nor the Eighth Amendment claim.

On November 15, 1992, the Respondent filed a Response to Petitioner's Motion to Dismiss. In his response, the prosecutor argued that the whole property was forfeitable and that forfeiture of the whole did not exact an excessive penalty in violation of the United States Constitution under the test articulated by Justice Scalia in his concurring and dissenting opinion in *Austin v. United States*, __ U.S. __, 113 S. Ct. 2801 (1993) or a value-based test.

Ultimately, the prosecutor and the court treated the properties as severable. As severed property the Defendant/Claimants conceded that the parcel upon which sat the pole barn was forfeitable and the prosecutor conceded that the vacant parcel was not forfeitable. The hearing centered on whether forfeiture of the parcel containing the residence would violate the Excessive Fines Clause of the Eighth Amendment. At the hearing, the value of the parcel containing the residence was never firmly established. The prosecutor argued that from a government done appraisal, that the property was valued at $85,000, with a secured mortgage of $37,000. Counsel for the Claimants argued that the value was greater than that and fair market value should control. The court concluded the hearing by directing the prosecutor to provide an affidavit as to the wholesale and retail value of the marijuana discovered in the pole barn. The prosecutor provided the affidavit, which approximated the retail value of the marijuana at between $64,000 and $89,600.

On April 5, 1994, the court entered a Memorandum and Order finding that the residence was forfeitable and finding that its forfeiture did not violate the Excessive Fines Clause of the Eighth Amendment. On April 15, 1994, the court entered a Final

Order ordering forfeiture of the parcel containing the pole barn and the parcel containing the residence. The court dismissed the Complaint for Forfeiture as it related to the vacant parcel.

On appeal to the Sixth Circuit Court of Appeals, the Petitioner argued that the forfeiture of the property was punishment which violated the Eighth Amendment Excess Fines Clause and that after Austin, the appropriate test for the Excessive Fines Clause analysis was a proportionality test. The Respondent argued that the appropriate test was an "instrumentality" test, articulated by Justice Scalia in his concurring opinion in *Austin v. United States*, __ U.S. __, 113 S. Ct. 2801 (1993).

The Sixth Circuit Court, in its Opinion affirming the District Court correctly noted that: "Since the *Austin* decision, no single test has been universally accepted by the federal judiciary." The court, then, after discussing both tests, declined to adopt either test, leaving the courts, practitioners and citizens of this Circuit without guidance on this particular issue.

REASONS FOR GRANTING THE WRIT

Summary

The decision below presents an opportunity to answer the question left undecided in *Austin v. United States*, __ U.S. __, 113 S. Ct. 2801 (1993) and to resolve a growing split in the United States Courts of Appeals.

I.

THE APPROPRIATE TEST LEFT UNRESOLVED IN *AUSTIN V. UNITED STATES*, __ U.S. __, 113 S. CT. 2801 (1993) IS RIPE FOR DECISION.

In *Austin v. United States*, __ U.S. __, 113 S. Ct. 2801 (1993), this Court held that civil forfeiture under 21 U.S.C. § 881(a)(4) and (a)(7) constitutes punishment and is subject to the limitations of the Eighth Amendment Excessive Fines Clause. This Court, however, declined petitioner Austin's invitation to establish a "bright line" test to be used by the lower courts in determining when a forfeiture is constitutionally excessive. The Court stated, "Prudence dictates that we allow the lower courts to consider the question in the first instance." 113 S. Ct. at 2812.

Justice Scalia, in a separate concurring opinion in *Austin*, *supra*, stated:

> That this forfeiture works as a fine raises the excessiveness issue, on which the Court remands. I agree that a remand is in order, but think it worth pointing out that on remand the excessiveness analysis must be different from that applicable to monetary fines and, perhaps to *in personam* forfeitures. In the case of a monetary fine, the Eighth Amendment's origins in the English Bill of Rights, intended to limit the abusive penalties assessed against the king's opponents, *see Browning-Ferris*, 492 U.S. at 266-267, demonstrate that the touchstone is value of the fine in relation to the offense. And in *Alexander v. United States*, we

> indicated that the same is true for *in personam* forfeiture.
>
> * * *
>
> The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.

(113 S. Ct. at 2815).

Circuit Courts of Appeals and commentaries have termed Justice Scalia's remarks as the "instrumentality test". *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995); George, *Finally an Eye for an Eye: The Supreme Court Lets the Punishment Fit the Crime in Austin v. United States*, 46 Baylor Law Review, 509-524 (Spring, 1994).

The majority opinion in footnote 15 commented on Justice Scalia's test stating:

> Justice Scalia suggests that the sole measure of an *in rem* forfeiture's excessiveness is the relationship between the forfeited property and the offense. See post, at 5-6. We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive.

(*Id.*).

Since this Court's decision, *no* single test has been universally accepted by the federal judiciary. In fact, three tests and four approaches concentrating on different factors, have emerged. (*See* split in the Circuit Courts of Appeals, below). While prudence may have dictated the appropriate response in *Austin*, *supra*, the rule of finality of judgments and consistency in the application of principles of constitutional law, should now apply. For the reasons set forth below, the appropriate test is ripe for review.

II.

IN THE AFTERMATH OF THIS COURT'S DECISION IN *AUSTIN V. UNITED STATES*, __ U.S. __, 113 S. CT. 2801 (1993), THE CIRCUIT COURTS OF APPEALS HAVE DEVELOPED A THREE-WAY SPLIT ON THE APPROPRIATE TEST TO DETERMINE WHEN FORFEITURE, AS PUNISHMENT, VIOLATES THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE.

Since this Court's decision, *no* single test has been universally accepted by the federal courts. In fact, three tests and four approaches to the problem have emerged and the Circuit Courts of Appeals are split on the appropriate test.

The Fourth Circuit has adopted a strict instrumentality test. *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995).

The majority of the federal judiciary has adopted a hybrid "proportionality" test. *See United States v. Milbrand*, 58 F.2d 841, 847 (2nd Cir. 1995); *United States v. 6380 Little Canyon Rd.*, 59 F.3d 947, 983-85 (9th Cir. 1995); *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493 (11th Cir. 1994) (applying a proportionality analysis in the context of gambling forfeiture); *United States v. 9638 Chicago Heights*, 27 F.2d 327, 330 (8th Cir.

1994); *United States v. Myers*, 21 F.3d 826 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 742 (1995); *United States v. RR #1, Box 224*, 14 F.3d 864, 875 (3d Cir. 1994); *United States v. 143-147 E. 23rd St.*, 888 F. Supp. 580, 586-87 (S.D.N.Y. 1995); *United States v. 6625 Zumeriz Drive*, 845 F. Supp. 724, 732 (C.D. Cal. 1994); *United States v. 24124 Lemay St.*, 857 F. Supp. 1373 (C.D. Cal. 1994); *United States v. 427 & 429 Hall St.*, 853 F. Supp. 1389, 1399-1400 (M.D. Ala. 1994).

The Eleventh Circuit Court of Appeals recently adopted a strict proportionality test. *United States v. One Parcel Property Located at 427 and 429 Hale Street, Montgomery, Alabama (Jenkins)*, __ F.3d __ (11th Cir., No. 94-6643, 2/14/96, 58 Cr. L. 1469, 2/28/196).

The Sixth Circuit Court of Appeals has twice declined to articulate any test. *See United States v. 429 S. Main St.*, 52 F.2d 1416, 1422 (6th Cir. 1995) and the present case (*see* Appendix B).

The unfortunate result of this disparent treatment is that the determination as to whether a person losses his property (often his home) is dependent on the location of the property, not the application of constitutional principles.

The Court should resolve the split in the Circuit Courts of Appeals to assure that one test for determining that an important constitutional principle is applied consistently throughout the United States.

III.

THE EMERGING TESTS

A. The Strict Instrumentality Test

The Fourth Circuit has adopted the use of the "instrumentality" test for forfeitures pursuant to § 881(a)(7). *See United States v. Chandler*, 36 F.3d 358 at 365 (4th Cir. 1994). In *Chandler*, the court found that the forfeiture at issue was not a violation of the Eighth Amendment's Excessive Fines Clause because of the close relationship between the illegal drug trafficking and the property in question. *Id.* at 366. The defendant was found to have used the property to facilitate drug transactions as well as to store drugs. *Id.* at 361. Evidence presented by the government at the jury trial showed the defendant made at least one multiple-pound marijuana transaction on the property and used drugs as a form of payment to individuals who worked at the property. *Id.* The *Chandler* jury found, "that the property had been used to facilitate the commission of violations of the drug laws, that the property was improved by the proceeds of drug exchanges, and that Chandler could not claim a lack of awareness." *Id.*

The instrumentality test, as established in *Chandler*, requires a balancing of the following three factors, with no one factor being dispositive, when determining whether forfeiture is excessive: (1) the nexus between the offense and the property and the extent of the property's role in the offense; (2) the role and culpability of the owner; and (3) the possibility of separating the offending property from the remainder. *Id.* at 365. In determining the nexus between the property and the offense, the *Chandler* court considered the following: (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was

important to the success of the illegal activity; (3) the time during which the property was illegally used and the spatial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense. *Id.*

The "instrumentality" test has come under intense criticism.

In the *Supreme Court, 1992 Term-Leading Cases*, 107 Harv. L. Rev. 144, 214 (1993), the author stated:

> Judge Scalia's proposed test should not stand alone, however, to give full meaning to the notion of excessiveness, punishment must be graduated and proportioned to the offense. A test that combines a threshold instrumentality test with a secondary proportionality test would strike an appropriate balance between curbing judicial discretion and retaining the constitutional norm of proportionality .

(*Id.* 214, footnote omitted).

See also Buckley, *A Proposed Measure for Excessiveness After Austin v. United States Put a Twist on the Forfeiture Laws*, 29 Gonzaga Law Review, 621-643 (Spring, 1994), which rejected the straight application of the "instrumentality" test in favor of combined instrumentality and proportionality test.

In George, *Finally an Eye for an Eye: The Supreme Court Lets the Punishment Fit the Crime in Austin v. United States*, 46 Baylor Law Review, 509-524 (Spring, 1994). The author in a critical assessment of Justice Scalia's instrumentality test wrote:

> Justice Scalia's test does not address the issue of proportionality and only considers one factor, the relationship between the property and the offense. As shown in the previous section, this can lead to results in which the punishment is not proportional to the offense. Austin held civil forfeiture must be proportional, yet Justice Scalia's test does not effectively determine if a forfeiture is disproportionate.
>
> Justice Scalia's test is easier to apply than the proposed test* as it considers only one factor, and that factor is not difficult to apply. However, the test sacrifices proportionality to achieve certainty.
>
> ---
>
> * The test proposed by the author was a multifactor test incorporating both the instrumentality test and a proportionality test.

(*Id.* 523).

B. The Hybrid Proportionality Test

The majority of the federal courts of appeal and a few district courts have developed a "hybrid proportionality test" which first utilizes an instrumentality test and then applies a "proportionality" analysis. *See United States v. 6380 Little Canyon Rd.*, 59 F.3d 974 (9th Cir. 1995); *United States v. 9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994); *United States v. RR #1, Box 224*, 14 F.3d 864 (3d Cir. 1994).

In *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974 (9th Cir. 1995), the Ninth Circuit reversed and remanded the District Court's order of forfeiture in order to allow the District Court to

apply a hybrid test to determine whether the forfeiture was excessive. *Id.* at 987-88. The first prong of the test called for the government to prove the property was an instrument of the crime based on the instrumentality analysis suggested by Justice Scalia in his *Austin* concurrence. *Id.* at 985. The court determined that the initial inquiry was whether the property had "a close enough relationship to the offense to permit its confiscation to any extent. " *Id.* at 982. Once the government established a nexus between the property and the illegal activity, the burden fell on the claimant to show that forfeiture of the property was "grossly disproportionate given the nature and extent of [the claimant's] criminal culpability. *Id.* at 985. The *6380 Little Canyon Road* court determined that a trial court should consider the following three factors when determining the harshness of the forfeiture: (1) the fair market value of the property; (2) the intangible, subjective value of the property, *e.g.*, whether it is a family home; and (3) the hardship to the defendant, including the effect of the forfeiture on the defendant's family or financial condition. *Id.* In determining the culpability of the owner, the court advised consideration of the following factors: (1) whether the owner was negligent or reckless in allowing the illegal use of his property; (2) whether the owner was directly involved in the illegal activity and to what extent; and (3) the harm caused by the illegal activity, including (a) (in the drug trafficking context) the amount of drugs and their value, (b) the duration of the illegal activity and (c) the effect on the community. *Id.* at 986.

Another viable hybrid proportionality test was articulated by Judge Pfaelzer in *United States v. Real Property at 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D. Cal. 1994).

In *Zumeriz Drive*, the court proposed the following multifactor test:

> In this Court's view, in determining

> whether a forfeiture violates the Excessive Fines Clause, three factors should be weighed, with no one factor being dispositive, (i) the inherent gravity of the offense compared with the harshness of the penalty; (ii) whether the property was an integral part of the commission of the crime; and (iii) whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use.

Under the first prong, the Court must look at the claimant's conduct compared with the harshness of the penalty. The Court in assessing the claimant's conduct must recognize the difference between conduct for which one has been charged and convicted of the underlining crime; conduct for which the claimant has not been charged; and conduct for which the claimant has been charged but acquitted.

The analysis for each is different. In the first situation, the court can easily evaluate the gravity of the offensive conduct since the court did not engage in assumptions: the claimant did in fact commit the offense which forms the basis of the government's probable cause to forfeit the property. In the second situation, the court cannot assume that the claimant committed the offense. Neither can it assume that he did not. This claimant's conduct must be viewed as necessarily less grave than that of the claimant convicted in the first situation, but the conduct is inherently more grave than that of the claimant in the third situation. The behavior of the claimant in the third situation must be considered the least grave: the claimant has been charged and acquitted of the underlying offense, and cannot be treated "as if" he had committed that offense for purposes of evaluating the gravity of his conduct.

In comparing the conduct to the harshness of the penalty, the court:

> . . . must consider not only monetary value of the property forfeited, but also the intangible value of the particular property involved.

(*Id.* 734).

> Society and the courts place a high value on real property, in particular the home, than on personal property. In a recent forfeiture decision, the Supreme Court affirmed the essential principal that "[i]ndividual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it." *United States v. James Daniel Good Real Property, et al*, __ U.S. __, 114 S.Ct. 492, 505, 126 L. Ed. 2d 490 (1993). *See also, Payton v. New York*, 445 U.S. 573, 601, 100 S. Ct. 1371, 1388, 63 L. Ed. 2d 639 (1980) ("[R]espect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic").

The second factor of whether the property was an integral part of the commission of the crime incorporates the "instrumentality" test of Justice Scalia in his concurrence in *Austin, supra*.

Under the third factor which incorporates the analysis found in *Alexander v. United States*, __ U.S. __, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993), "the court looks not only at whether the

defendant property was an integral part of the criminal activity, but whether the defendant property played an extensive or pervasive role in the commission of the crime". (*Id.* 734).

C. The Strict Proportionality Test

In *United States v. One Parcel Property Located at 427 and 429 Hall Street, Montgomery, Alabama (Jenkins)*, __ F.3d __, No. 94-6643 (11th Cir. 2/14/96), the court concluded that the only appropriate test is a strict proportionality test where the severity of the fine (imposed as civil forfeiture) is compared to the severity of the offense committed. The court in reaching this conclusion, relied upon, (1) the reasoning used by the *Austin* court in its conclusion that the clause applies; (2) the plain meaning of the clause, and (3) the history of the clause.

The court stated:

> First, the *Austin* court made clear that Section 881(a)(7) is designed to, and does, punish individuals involved in drug trafficking. It is primarily for this reason that the instrumentality test is inappropriate. When the Excessive Fines Clause, which constrains the power of the sovereign to punish, comes in to play, it necessarily protects the person punished, i.e. the owner of the property.
>
> Second, the Excessive Fines Clause on its face prohibits fines which are "excessive" — i.e. fines that are (in amount) just too much. And because the clause protects the individual punished, this turn of phase necessarily implies a comparison of the amount of the fine with the acts of the

> individual. This is simply a logical reading of the provision in question. *See Harmelin v. Michigan*, 502 U.S. 957 (1991) (Scalia, J. and Rehnquist, C.J.) (rejecting a proportionality review under the Cruel and Unusual Punishments Clause in part because "the drafters of the [English] Declaration of Rights did not explicitly prohibit 'disproportionate' or 'excessive' punishments").
>
> Finally, the historical antecedents of our Excessive Fines Clause, including the Magna Carta and the 1689 English Declaration of Rights (and its statutory counterpart, the Bill of Rights), required proportionality review. In sum, the principle that "fines" are not to be "excessive" (i.e. "out of proportion") was well rooted in English law when our country came of age. And, of course, the Eighth Amendment "was based directly on Art. I, § 9 of the Virginia Declaration of Rights (1776), authored by George Mason. He, in turn, had adopted verbatim the language of the English Bill of Rights." Solem v. Helm, 463 U.S. 277, 286 n.10 (1983).

The "hybrid" proportionality test and the strict proportionality test are not free of criticism, due to the fact that this Court's decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991) cast doubt on whether a proportionality analysis as set froth in *Solem v. Helm*, 463 U.S. 227 (1983) is part of Eighth Amendment jurisprudence. *See United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994). This theory has itself been criticized.

See Supreme Court, 1992 Term-Leading Cases, 107 Harv. L. Rev. 144, 210-211 (1993).

CONCLUSION

The lower courts have been unable to fashion an appropriate test to determine whether the forfeiture of property (often, as in this case, a home) is excessive under the Eighth Amendment. The Court should grant certiorari to resolve the three way split in the Circuits and also to clarify the important constitutional question of whether a proportionality analysis is a component of Eighth Amendment jurisprudence.

Dated: April 23 , 1996

Respectfully submitted,

THOMAS V. WILHELM
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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JANUARY 24, 1996

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 94-1640

IN RE: SEIZURE WARRANT 11869 WESTSHORE DRIVE, PUTNAM TOWNSHIP, LIVINGSTON COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CERTAIN REAL PROPERTY LOCATED AT 11869 WESTSHORE DRIVE, PUTNAM TOWNSHIP, LIVINGSTON COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES,

Defendant-Appellant,

KATHRYN DUPRIE, ET AL.,

Claimants.

ORDER

BEFORE: KEITH, KENNEDY, and SILER, Circuit Judges.

Appendix A

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judge of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk *se.*

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED DECEMBER 6, 1995

No. 94-1640

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CERTAIN REAL PROPERTY LOCATED AT 11869 WESTSHORE DRIVE, PUTNAM TOWNSHIP, LIVINGSTON COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES,

Defendant-Appellant,

KATHRYN DUPRIE, NEAL DUPRIE, D&N BANK,

Claimants.

ON APPEAL from the United States District Court
for the Eastern District of Michigan

Decided and Filed December 6, 1995

Before: KEITH, KENNEDY, and SILER, Circuit Judges.

DAMON J. KEITH, Circuit Judge. The Claimants, Neal and Kathryn Duprie ("Dupries") appeal the decision of the district court granting the Plaintiff-Appellee's, the United States Government, motion for summary judgment and denying their

motion to dismiss the forfeiture complaint filed against the Defendant-Appellant property, a residence located at 11869 West Shore Drive, Putnam Township, Livingston County, Michigan ("Property"). The granting of the government's motion for summary judgment forfeited the Dupries' interest in the Property. For the reasons stated below, we **AFFIRM** the district court's decision to grant the government's motion for summary judgment and deny the Dupries' motion to dismiss the forfeiture complaint.

I. Statement of the Case

In April 1992, the Livonia Police Department received information from a confidential informant that Neal Duprie was selling multiple-pounds of marijuana. The Livonia Police made a controlled purchase of marijuana from Neal Duprie at his place of employment. In June, 1992, the confidential informant made a second, multiple-pound, purchase of marijuana from Neal Duprie using pre-recorded funds. The second purchase was made on the curtilage of the Dupries' Property.[1] Based on these two purchases the Livonia Police secured a warrant to search two lots — one containing a house and another a pole barn — on the Property.

On June 17, 1992, the United States Government filed a complaint for forfeiture seeking the seizure and forfeiture of the Property, pursuant to 21 U.S.C. § 881(a)(7).[2] The state criminal

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1. The Property is divided into three distinct lots. One of the lots sits across the street from the house and contains a well. The Dupries' residence is situated on a second lot and a third lot contains a pole barn.

2. 21 U.S.C. § 881(a)(7) states:

(Cont'd)

complaint against the Dupries and the federal forfeiture complaint against the Property were based on the above-mentioned marijuana sales by Neal Duprie.

The execution of the warrant uncovered various amounts of marijuana throughout the residence, $8,380.00 in cash (some of which were the pre-recorded funds used in the controlled purchases) and several weapons. The Livonia Police also seized approximately 25 pounds of marijuana, which was found in the pole barn. Also, during the execution of the search warrant the police found a "fanny pack" containing a "baggie" of marijuana and Kathryn Duprie's drivers license.

When the Dupries arrived at the Property during the execution of the search warrant, they were arrested and charged

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(Cont'd)

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> > (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

with violating Michigan State narcotics laws. Neal Duprie pled guilty to a felony charge and was sentenced to eight months incarceration. Kathryn Duprie pled guilty to a misdemeanor drug charge and received a fine.

On June 29, 1992, the Dupries filed separate claims to the Property and asserted affirmative defenses to the forfeiture complaint. The affirmative defenses alleged that the search warrant was unconstitutional and that the Property was not subject to forfeiture.

On July 30, a claim to the Property and an answer were filed by D&N Bank ("Bank"). The government agreed to recognize the Bank as an innocent lienholder on the Property. A settlement agreement between the government and the Bank was filed with the district court on April 21, 1993.

On August 18, 1992, the government served the Dupries with discovery materials seeking, *inter alia*, admissions regarding their alleged underlying illegal activity at the Property. The Dupries never responded to the admissions, which were later deemed admitted by an order of the district court issued on September 14, 1993. The district court's order found that, in the face of the Dupries' failure to respond, the following facts were deemed admitted: (1) that the Property was used by Neal Duprie to traffic in multiple-pounds of marijuana; (2) that Neal Duprie used the Property to sell multiple-pounds of marijuana in May and June of 1992; (3) that a search of the Property uncovered marijuana in the study, the master bedroom, the garage, the guest room, the kitchen, the living room and in a "fanny pack"; and (4) that Kathryn Duprie was aware of Neal Duprie's drug trafficking activities at the residence.

Appendix B

The Dupries filed a motion to dismiss the government's forfeiture complaint on November 1, 1993, arguing that the forfeiture of the Property was unconstitutional under the excessive fines clause of the Eighth Amendment. On November 2, 1993, the government responded to the Dupries' motion to dismiss by filing their motion for summary judgment.

In support of their motion for summary judgment, the government filed an affidavit detailing the underlying criminal activity of the Dupries. The affidavit was sworn out by Drug Enforcement Agency ("DEA") Agent Marie Pikiell ("Agent Pikiell"). This affidavit outlined the marijuana trafficking activities of the Dupries and discussed the two marijuana transactions between Neal Duprie and the confidential informant. Agent Pikiell's affidavit also outlined the objects seized during the execution of the warrant.

On March 2, 1994, the district court held a hearing to decide both the government's motion for summary judgment and the Dupries' motion to dismiss the forfeiture complaint. At the hearing, the district court requested additional evidence from both parties regarding the value of the marijuana involved in the case. At that time, the government stipulated that the lot containing the well was not forfeitable. In addition, the Dupries stipulated that the pole barn was forfeited. Therefore, the sole focus of the hearing was on forfeiture of the residence.

On March 15, 1995, the government complied with the district court's request for additional information and filed its affidavit detailing the value of the marijuana and outlining the underlying criminal conduct of the Dupries. The second affidavit was sworn out by DEA Agent Benjamin McDermott ("Agent McDermott"). Agent McDermott's affidavit established the

"street value" of the marijuana found at the Property and the marijuana sold to the confidential informant to be between $64,000 and $89,600. The discovery deemed admitted by the Dupries' failure to answer supported the information provided in Agent McDermott's affidavit. The Dupries failed to take advantage of their opportunity to supplement the record on the value of the marijuana found at the Property.

On April 5, 1994, the district court issued its memorandum and order granting the government's motion for summary judgment and denying the Dupries' motion to dismiss the forfeiture complaint. The district court ordered the lots containing the residence and the pole barn be forfeited to the government and dismissed the complaint against the lot which contained the well. In addition, the district court held that the forfeiture did not violate the excessive fines clause of the Eighth Amendment.

The district court reached its conclusion by applying both an "instrumentality" test and a "value analysis." The district court determined the house had been used as a "sales office" by the Dupries to facilitate two multiple-pound marijuana transactions in a short period of time. The district court also held that the forfeiture of the house was not excessive after comparing the value of the 32 pounds of marijuana to the value of the house.

The Dupries filed a timely notice of appeal.

II. Discussion

On appeal, the Dupries argue the district court erred in finding that the forfeiture of their residence was not an excessive fine under the Eighth Amendment. We find that the district court

reached the proper conclusion in ordering the residence of the Property forfeited to the government.

A. Standard of Review

We review the granting of summary judgment *de novo*. *United States v. $67,220.00 in United States Currency*, 957 F.2d 280, 284 (6th Cir. 1992). Summary judgment is appropriate where there is no genuine issue of material fact. Fed. R. Civ. P. 56; *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). When reviewing the granting of summary judgment in a forfeiture proceeding, an appeals court must view the facts in the light most favorable to the non-moving party. *$67,220.00 in United States Currency*, 957 F.2d at 284.

B. Constitutionality of the Forfeiture Following the Holding in *United States v. Austin*

The Supreme Court has recently held that an in rem order of forfeiture is "payment to a sovereign as punishment for some offense," and is therefore subject to the Eighth Amendment[3] limitation on excessive fines. *Austin v. United States*, __ U.S. __, 113 S. Ct. 2801, 2812 (1993). Certiorari was granted in *Austin* to resolve the issue of whether the Eighth Amendment applied to in rem forfeiture. *Id.* at 2803. The defendant in *Austin* had his mobile home forfeited to the government, on a motion for summary judgment, after he sold cocaine to another individual.

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3. The Eighth Amendment of the constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. U.S. Const. amend. VIII.

Id. The defendant appealed the forfeiture order claiming it violated the excessive fines clause of the Eighth Amendment. *Id.* The Eighth Circuit reluctantly upheld the forfeiture order. *Id.* Although the circuit court found the government's forfeiture disproportionate to the offense, it concluded that there was no basis for finding that proportionality review of forfeitures was constitutionally required. *Id.*

The *Austin* court reversed the Eighth Circuit and found that throughout history, forfeiture not only has served a remedial purpose, but also has served as punishment. It remanded the case back to the circuit court so that it could conduct an excessive fines analysis. *Id.* at 2805-12. Despite finding that in rem forfeiture is subject to the Eighth Amendment, the Court in *Austin* declined the invitation to establish a bright line test. *Id.* at 2812. Instead the Court declared that "[p]rudence dictates that we allow the lower courts to consider that question in the first instance." *Id.*

Since the *Austin* decision, no single test has been universally accepted by the federal judiciary. At least one court has followed the example set by Justice Scalia's concurrence in *Austin* and has solely utilized an "instrumentality" test. *See United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995). Other federal courts have adopted a hybrid test which first determines instrumentality factors and then applies a "proportionality" analysis. *See United States v. Milbrand*, 58 F.3d 841, 847 (2nd Cir. 1995); *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 983-85 (9th Cir. 1995); *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493 (11th Cir. 1994) (applying a proportionality analysis in the context of gambling forfeiture); *United States v. 9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir. 1994); *United States v. Myers*, 21 F.3d 826 (8th Cir. 1994), *cert.*

denied, 115 S. Ct. 742 (1995); *United States v. RR #1, Box 224*, 14 F.3d 864, 875 (3d Cir. 1994); *United States v. 143-147 E. 23rd St.*, 888 F. Supp. 580, 586-87 (S.D.N.Y. 1995); *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 732 (C.D. Cal. 1994); *United States v. 24124 Lemay St.*, 857 F. Supp. 1373 (C.D. Cal. 1994); *United States v. 427 & 429 Hall St.*, 853 F. Supp. 1389, 1399-1400 (M.D. Ala. 1994). Finally, although a panel of this Circuit has addressed the excessive fines issue once before, that panel refrained from establishing an excessive fines test since the claimant failed to produce evidence sufficient to demonstrate that the fine was excessive under either an instrumentality or proportionality analysis. *United States v. 429 S. Main St.*, 52 F.3d 1416, 1422 (6th Cir. 1995).

1. Instrumentality Test

While the Court in *Austin* declined the opportunity to establish a single test for determining whether a forfeiture is an excessive fine, Justice Scalia's concurring opinion proclaims that the appropriate test in an Eighth Amendment excessive fine case should focus on the connection between the property and the illegal conduct, *i.e.*, how the property was used as an "instrumentality" of the crime.[4] *Austin*, 113 S. Ct. at 2815 (Scalia, J., concurring). Justice Scalia stated "[t]he relevant inquiry for an excessive forfeiture under [21 U.S.C.] § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?" *Id.*

The Fourth Circuit has embraced the use of the

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4. However the majority did recognize the viability of the "instrumentality" test espoused by Justice Scalia. *Austin*, 113 S. Ct. at 2812 n.15.

"instrumentality" test for forfeitures pursuant to 21 U.S.C. § 881(a)(7). *See Chandler*, 36 F.3d at 365. In *Chandler*, the court found that the forfeiture at issue was not a violation of the Eighth Amendment's excessive fines clause because of the close relationship between the illegal drug trafficking and the property in question. *Id.* at 366. The defendant was found to have used the property to facilitate drug transactions as well as to store drugs. *Id.* at 361. Evidence presented by the government at the jury trial showed the defendant made at least one multiple-pound marijuana transaction on the property and used drugs as a form of payment to individuals who worked at the property. *Id.* The *Chandler* jury found, "that the property had been used to facilitate the commission of violations of the drug laws, that the property was improved by the proceeds of drug exchanges, and that Chandler could not claim a lack of awareness." *Id.*

The instrumentality test, as established in *Chandler*, requires a balancing of the following three factors, with no one factor being dispositive, when determining whether forfeiture is excessive: (1) the nexus between the offense and the property and the extent of the property's role in the offense; (2) the role and culpability of the owner; and (3) the possibility of separating the offending property from the remainder. *Id.* at 365. In determining the nexus between the property and the offense, the *Chandler* court considered the following:

> (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spatial extent of its use; (4) whether its illegal use

was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense. *Id.*

2. Proportionality Analysis and Hybrid Tests

The remaining courts addressing the excessive fines issue have either created or recognized as permissible a hybrid test which first utilizes an instrumentality test and then applies a "proportionality" analysis. *See, e.g., 6380 Little Canyon Rd.*, 59 F.3d at 985-86 (applying instrumentality test first and then performing a proportionality analysis to determine whether in rem forfeiture for unlawful marijuana sale constitutes an excessive fine); *see also 6625 Zumirez Drive*, 845 F. Supp. at 732-33 (adopting a proportionality analysis that compares the inherent gravity of the offense to the harshness of the crime).

Proportionality analysis compares the value of the property to a variety of factors which may include the culpability of the claimant, the gravity of the offense, the relationship of the property to the offense and the harm caused to the community. *See, e.g, 6380 Little Canyon Rd.*, 59 F.3d at 985-86. Use of the proportionality test emanates from the Supreme Court's holding in *Solem v. Helm*, 463 U.S. 277, 290-92 (1983). Although *Solem* dealt with cruel and unusual punishment, the court's analysis in that case has been extended to the excessive fines context. *See, e.g., 6380 Little Canyon Rd.*, 59 F.3d at 983. The *Solem* Court asserted that a proportionality analysis should be guided by objective criteria, including: (1) the gravity of the offense and the harshness of the penalty; (2) the sentence imposed on other criminals in the same jurisdiction for similar or more serious crimes; and (3) the sentence imposed on other criminals in other jurisdictions for the same crime. *Solem*, 463 U.S. at 290-92. The

Court determined that all of these factors should be weighed objectively in determining whether a punishment is excessive in violation of the Eighth Amendment. *Id.*

The Fourth Circuit has rejected the application of proportionality analysis to the excessive fines context based in part on the Supreme Court's holding in *Harmelin v. Michigan*, 501 U.S. 957 (1991). *Chandler*, 36 F.3d at 365. In *Harmelin*, a majority of the Justices raised questions about the proportionality aspect of the punishment provisions of the Eighth Amendment. *Harmelin*, 501 U.S. at 964-66, 1001. Justice Scalia wrote: "[I]f the Constitution does not affirmatively contain such a restriction [against disproportionate sentences], the matter of proportionality is left to the state constitutions to decide." *Id.* at 977 n.6. Justice Scalia's opinion in *Harmelin* reasoned that disproportionate punishment had been commonplace in the United States since the inception of the Bill of Rights in 1789. *Id.* at 987-88. Justice Kennedy, who was joined by Justice O'Connor and Justice Souter in concurring, disagreed with Justice Scalia's conclusion that the Eighth Amendment did not have a proportionality consideration. *Id.* at 1000. Justice Kennedy, instead, concluded that there is a very limited proportionality analysis since the Eighth Amendment forbids sentences which are "grossly disproportionate to the crime "committed]." *Id.* at 1001.

Since neither *Harmelin* nor *Solem* specifically involved the excessive fines provision of the Eighth Amendment and since the desire to overrule *Solem* is expressed by only two members of the *Harmelin* Court, the effects of *Harmelin* on the proportionality analysis of excessive fines is unclear. Consequently' most courts have continued to include proportionality analysis as part of a hybrid test in the excessive fines context. *See, e.g., Milbrand*, 58 F.3d 847-48. In adopting a hybrid approach, one court reasoned

that a combined test "would strike an appropriate balance between curbing judicial discretion and retaining the constitutional norm of proportionality." *427 and 429 Hall St.*, 853 F. Supp. at 1399 n.23 (citations omitted).

In *Milbrand*, the Second Circuit, using a hybrid test, found constitutional the forfeiture of the claimant s property which was used to further illegal drug activities. *Milbrand*, 58 F.3d at 848. The claimant's son openly cultivated 1,362 marijuana plants on and around claimant's property. *Id.* at 844. After ruling that the claimant could not assert an innocent owner defense, the *Milbrand* court considered the following factors in order to determine whether the forfeiture was excessive:

> (1) the harshness of the forfeiture (*e.g.*, the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such offense;
>
> (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and
>
> (3) the role and degree of culpability of the owner of the property.

Milbrand, 58 F.3d at 847-48.

Appendix B

The Ninth Circuit has applied a "hybrid" test similar to that applied in *Milbrand*. *See 6380 Little Canyon Rd.*, 59 F.3d at 985. In *6380 Little Canyon Road* the Ninth Circuit reversed and remanded the district court's order of forfeiture in order to allow the district court to apply a hybrid test to determine whether the forfeiture was excessive. *Id.* at 987-88. The first prong of the test called for the government to prove the property was an instrument of the crime based on the instrumentality analysis suggested by Justice Scalia in his *Austin* concurrence. *Id.* at 985. The court determined that the initial inquiry was whether the property had "a close enough relationship to the offense to permit its confiscation to any extent." *Id.* at 982. Once the government established a nexus between the property and the illegal activity, the burden fell on the claimant to show that forfeiture of the property was "grossly disproportionate given the nature and extent of [the claimant's] criminal culpability." *Id.* at 985. The *6380 Little Canyon Road* court determined that a trial court should consider the following three factors when determining the harshness of the forfeiture: "(1) the fair market value of the property; (2) the intangible, subjective value of the property, *e.g.*, whether it is a family home; and (3) the hardship to the defendant, including the effect of the forfeiture on the defendant's family or financial condition." *Id.* In determining the culpability of the owner, the court advised consideration of the following factors: "(1) whether the owner was negligent or reckless in allowing the illegal use of his property; or (2) whether the owner was directly involved in the illegal activity, and to what extent; and (3) the harm caused by the illegal activity, including (a) (in the drug trafficking context) the amount of drugs and their value, (b) the duration of the illegal activity, and (c) the effect on the community." *Id.* at 986.

While the test established in *6380 Little Canyon Road* is the

law of the Ninth Circuit, we believe a discussion of an earlier test used by the Central District Court of California in *6625 Zumirez Drive* is worthy of mention in this opinion because it provides another viable test for district courts to explore when considering whether a forfeiture violates the Eighth Amendment. The hybrid approach set forth in *6625 Zumirez Drive* calls for a consideration of the following three factors with no one factor being dispositive: (1) whether the inherent gravity of the offense is excessive in relation to the harshness of the penalty; (2) whether the property was an integral part of the commission of the crime; and (3) whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use. *6625 Zumirez Drive*, 845 F. Supp. at 732. The first prong of this test is derived from the proportionality test established in *Solem*, but is modified to reflect the difference between a cruel and unusual punishment analysis and an excessive fines analysis. *See id.* at 732-33. Specifically, the *Zumirez* court concluded that in order to determine the inherent gravity of the offense, the court must first determine into which of the following categories the claimant's conduct falls: "(1) the claimant has been convicted of the criminal act or acts underlying the forfeiture; (2) the claimant has never been charged with any crime; [or] (3) the claimant has been charged and acquitted of the act or acts underlying the forfeiture." *Id.* at 733. If the claimant's conduct falls outside of the first and most severe category, the court cannot assume the claimant committed the offense and must therefore focus its inquiry solely on the actual involvement of the claimant in the illegal acts underlying the forfeiture. *Id.* In addition, the first prong of the *Zumirez* hybrid test includes an inquiry into the value of the property forfeited and the value of the particular type of property involved in order to determine the harshness of the penalty. *Id.* at 734. The second prong of the *Zumirez* test requires an instrumentality

analysis. *Id.* The third prong requires that a court consider "whether the defendant property played an extensive or pervasive role in the commission of the crime." *Id.* This prong is intended to provide a check of the government's "potential for abusive use of the civil forfeiture statutes." *Id.* at 735.

Finally, three other circuits have adopted or indicated a preference for the use of a less detailed hybrid test in the excessive fines context. In *18755 North Bay Road*, the Eleventh Circuit adopted a test that compared the defendants' role in the illegal gambling activity to the value of the home to determine that the forfeiture was excessive. *18755 N. Bay Rd.*, 13 F.3d at 1498. In *RR# 1, Box 224*, the Third Circuit remanded an excessive fines claim involving in rem forfeiture for illegal cocaine distribution. *RR# 1, Box 224*, 14 F.3d at 875. Although the Third Circuit chose not to establish an excessive fines test, it directed the district court to look to the proportionality test in *Solem* for guidance. *Id.* at 874-75.[5] In addition, the Eighth Circuit, while not establishing a test, has indicated that proportionality analysis should be utilized in determining the constitutionality of a forfeiture. *9638 Chicago Heights*, 27 F.3d at 330-331 (expressing dissatisfaction with the application of a pure instrumentality test because such a test fails to take into account the value of the property in monetary terms and the effect the forfeiture would have on innocent residents); *see also United States v. Myers*, 21 F.3d 826, 831 (8th Cir. 1994) (affirming district court's determination that the forfeiture of defendant's

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5. The *RR# 1, Box 224* court also instructed the lower court to model its proportionality analysis after that applied in *United States v. Sarbello*, a case in which the Third Circuit adopted components of the *Solem* test to determine whether a criminal RICO forfeiture violated the excessive fines clause of the Eighth Amendment. *United States v. Sarbello*, 985 F.2d 716 (3d Cir. 1993).

farm although harsh, was not disproportionate to the serious crimes for which the defendant was convicted).

3. Analysis

In the instant case, the district court applied both an instrumentality test and a proportionality test. The court used these analyses in order to determine whether the forfeiture of the lot containing the house would constitute an excessive fine under the Eighth Amendment.

In applying an instrumentality analysis, the district court concluded that the house was used as a "sales office" in which sales of marijuana were arranged, and that the pole barn was used as the "warehouse," to store the marijuana. Thus, the district court determined that the house was an instrument of the Dupries' marijuana trafficking. We are satisfied that the district court properly found a "nexus" between the Dupries' illegal activities and the house located on the Property.

Next, the district court, in what it defined as a "value analysis," applied the principles of the proportionality test. The district court's "value analysis" took into account the "street value" of the drugs found in the pole barn (26 pounds) and the drugs that were sold to the informant (six pounds) and determined the forfeiture of the house did not constitute an excessive fine under the Eighth Amendment. The "street value" of the marijuana, based on Agent McDermott's affidavit, had a range of between $125 to $175 per ounce. This valuation gave the 32 pounds of marijuana a "street value" of between $64,000 and $89,000. The "street" dollar value of the marijuana was then compared to the value of the house, which the government appraised to be at $85,000. Based on these figures, the district

court found the forfeiture to be "the functional equivalent of . . . a fine of $85,000." In addition, the district court determined that the forfeiture was not an excessive fine because its value did not exceed the potential $250,000.00 fine the Dupries could have been subjected to had they been charged federally for the marijuana found on the Property.

We conclude the district court conducted an appropriate analysis to determine whether the forfeiture of the house would be a violation of the Eighth Amendment. However, because of the factually intensive nature of these types of cases, this court chooses not to establish any one test to be applied in every case. There may be situations where the test applied by the district court in the instant case should be applied, while the facts comprising other cases may require the application of a different test to determine whether a forfeiture constitutes a violation of the Eighth Amendment. To that end, we **AFFIRM** the decision of the district court but decline the invitation of the parties to establish a single test to be used in this Circuit.

III. Conclusion

For the reasons stated above, we **AFFIRM** the granting of the government's motion for summary judgment and the denial of the Dupries' motion to dismiss the forfeiture complaint by the Honorable Avern Cohn, United States District Court Judge for the Eastern District of Michigan.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION DATED APRIL 18, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 92 CV 73383 DT

Honorable Avern Cohn

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN REAL PROPERTY LOCATED AT 11869 WESTSHORE DRIVE, PUTNAM TOWNSHIP, LIVINGSTON COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES,

Defendant.

FINAL JUDGMENT OF FORFEITURE

This matter having come before the Court on the Government's Motion for Summary Judgment, Claimants' Motion for Summary Judgment, and on the motion of Claimants' for Dismissal of Plaintiff's Complaint and the Court having entered an order of Partial Summary Judgment, and an order of Partial Dismissal on March 21, 1994; and a Memorandum and Order on April 5, 1994, and the Court being otherwise fully advised in the premises,

Appendix C

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that;

1. The portion of the defendant real property referred to during oral argument as that portion of 11869 Westshore Drive containing the residence, and more fully described as:

Part of the South 1/2 of Section 32, Town 1 North, Range 4 East, Michigan, described as follows: Beginning at a point which is North 74 degrees 5 minutes West 2301.60 feet; thence North 28 degrees 23 minutes West 60.00 feet; thence North 22 degrees 59 minutes West 60.00 feet; thence North 15 degrees 34 minutes West 50 feet; thence North 8 degrees 41 minutes West 65 feet; thence North 20 degrees 56 minutes West 35 feet; thence North 31 degrees 23 minutes West 52.16 feet; thence North 1 degree 01 minutes West 51.07 feet; thence North 7 degrees 20 minutes 10 seconds East 51.25 feet; thence North 18 degrees 22 minutes West 39.24 feet; thence North 32 degrees 13 minutes 27 seconds West 40.69 feet; thence North 38 degrees 54 minutes 43 seconds West 56.94 feet; thence North 36 degrees 33 minutes 23 seconds East 36.50 feet from the Southeast corner of Section 32; thence North 71 degrees 34 minutes 22 seconds West 82 feet; thence North 54 degrees 23 minutes East 64.80 feet; thence South 56 degrees 55 minutes 29 seconds East 75 feet; thence South 58

degrees 56 minutes 44 seconds West 44.04 feet to the place of beginning.

is hereby forfeited to the United States of America.

IT IS FURTHER ORDERED that;

2). The portion of defendant real property referred to during oral argument as that portion of 11869 Westshore Drive containing the pole barn, and more fully described as:

Part of the South 1/2 of the Southeast 1/4 of Section 32, Town 1 North, Range 4 East, Michigan, described as follows: Beginning at a point South 52 degrees 51 minutes 37 seconds East 262.40 feet from the occupied Northwest Corner of said South 1/2 of the Southeast 1/4; running thence along the Westerly Right-of-Way line of Westshore Drive, approximately 40 feet wide the following, North 45 degrees 38 minutes East 32.39 feet: thence North 49 degrees 23 minutes East 68.15 feet; thence North 57 degrees 53 minutes East 70.63 feet; thence North 66 degrees 23 minutes East 114.26 feet; thence North 32 degrees 31 minutes East 74.60 feet; thence North 16 degrees 21 minutes West 16.92 feet; thence North 17 degrees 49 minutes West 28.93 feet; thence North 22 degrees 19 minutes West 76.02 feet all along said right-of-way line; thence North 48 degrees 55 minutes West 88.47 feet along Westshore Drive; thence South

39 degrees 50 minutes West 58.40 feet; thence along the southerly line of a pond the following, South 22 degrees 36 minutes East 111.70 feet; thence South 21 degrees 44 minutes West 80.00 feet; South 79 degrees 10 minutes West 215.00 feet; thence South 2 degrees 35 minutes East 33.00 feet; thence South 60 degrees 11 minutes East 90.00 feet; thence South 32 degrees 19 minutes West 100.00 feet all along said edge of pond; thence South 52 degrees 51 minutes 37 seconds East 51.57 feet to the point of beginning.

Above parcel also being described as: Per Boss Engineering Survey Job #89576 dated 11-2-90

A part of the Southeast 1/4 of Section 32, Town 1 North, Range 4 East, Putnam Township, Livingston County, Michigan, more particularly described as follows: commencing at the Northwest corner of lot 1 DUNROVIN SUBDIVISION, according to the plat thereof recorded in Liber 8 of Plats, page 26, Livingston County Records; thence North 527.95 feet to a found iron at an old fence corner, being the occupied northwest corner of the South 1/2 of the Southeast 1/4 of said Section 32, and being the point of beginning of the parcel to be described; thence North 54 degrees 43 minutes 03 seconds West 59.20 feet to a found iron pipe in concrete; thence

Appendix C

North 38 degrees 08 minutes 03 seconds East 96.63 feet to a found iron pipe in concrete thence North 44 degrees 43 minutes 45 seconds East 159.96 feet to a found iron pipe in concrete; thence North 66 degrees 31 minutes 45 seconds East 100.00 feet; thence North 70 degrees 13 minutes 00 seconds East 147.97 feet to the center line of Westshore Drive (40 feet wide); thence along the said center line, South 53 degrees 24 minutes 56 seconds East 49.91 feet; thence continuing along the said center line, South 46 degrees 29 minutes 31 seconds East, 96.00 feet; thence continuing along the said center line, South 13 degrees 33 minutes 21 seconds East 113.49 feet; thence continuing along the said center line South 11 degrees 24 minutes 22 seconds East, 8.22 feet; thence South 78 degrees 35 minutes 38 seconds West 20.00 feet to the Northwesterly right-of-way line of said Westshore Drive; thence continuing along the said Northwesterly right-of-way line, South 15 degrees 09 minutes 50 seconds East 17.16 feet; thence continuing along the said Northwesterly right-of-way line, South 34 degrees 38 minutes 05 seconds West 94.85 feet; thence continuing along the said Northwesterly right-of-way line, South 29 degrees 29 minutes 16 seconds West, 26.98 feet; thence continuing along the said Northwesterly right-of-way line, South 63

degrees 06 minutes 10 seconds West 96.70 feet; thence along the said Northwesterly right-of-way line; South 54 degree. 24 minutes 10 seconds West, 69.35 feet; thence continuing along the said Northwesterly right-of-way line, South 50 degrees 28 minutes 10 seconds West 67.28 feet; thence continuing along the said Northwesterly right-of-way line, South 46 degrees 01 minute 49 seconds West, 11.40 feet; thence North 52 degrees 51 minutes 37 seconds West 260.65 feet to the point of beginning.

is hereby forfeited to the United States of America.

IT IS FURTHER ORDERED that:

3). All right, title and ownership interest of Neal Duprie and his wife Kathryn Duprie or his successors and assignees, or any other person, in those portions of the defendant real property described in paragraphs 1 and 2 above is hereby and forever EXTINGUISHED and that clear title to such real properties is hereby VESTED in the United States of America.

IT IS FURTHER ORDERED that;

4). The United States Marshal for the Eastern District of Michigan, or his delegate, be and is hereby AUTHORIZED to dispose of said real property according to law and subject to the secured interest of D&N Bank.

Appendix C

IT IS FURTHER ORDERED that;

5). Plaintiff's Complaint as to the portion of defendant real property, referred to during oral argument as the portion of 11869 Westshore Drive, Putnam Township, Livingston County, Michigan, which is vacant land, and more fully described as:

A parcel of land in the Southeast 1/4 of Section 32, Town 1 North, Range 4 East, Putnam Township, Livingston County, Michigan, described as follows: Commencing at the Southeast corner of Lot 87 of WESTSIDE SUBDIVISION, as recorded in Liber 2 or Plats, page 69, Livingston County Records; thence South 07° 17' 15" East 741.9 feet; thence North 32° 48' West 50.00 feet; thence North 70° 49' West 97.8 feet; thence South 47° 07' West 89.0 feet; thence North 48° 09' West 96.00 feet to the point of beginning; thence South 39° 50' West 58.40 feet; thence South 22° 36' East 111.70 feet; thence South 21° 44' West 80.00 feet; thence South 79° 10' West 215.00 feet; thence South 02° 35' East 33.00 feet; thence South 60° 11' East 90.00 feet; thence South 32° 19' West 100.00 feet; thence North 53° 40' West 270.00 feet; thence North 34° 50' East 97.00 feet; thence North 41° 34' East 160.00 feet; thence North 63° 22' East 100.00 feet; thence North 67° 18' East 148.50 feet; thence South 50° 10' East 50.00 feet to the point of beginning. Subject to and including the

use of a private road known as West Shore Drive.

shall be, and is hereby DISMISSED. The United States will discharge the Lis Pendens that was filed with the Livingston County Register of Deeds regarding this parcel of property.

s/ AVERN COHN
HONORABLE AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: APR 18 1994

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION DATED APRIL 5, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION 92-73383

HONORABLE AVERN COHN

UNITED STATES OF AMERICA,

Plaintiff,

v.

CERTAIN REAL PROPERTY LOCATED AT 11869 WESTSHORE DRIVE, PUTNAM TOWNSHIP, LIVINGSTON COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES,

Defendant.

MEMORANDUM AND ORDER

I.

This is a civil forfeiture case. 21 U.S.C. §881(a)(7). Plaintiff United States of America (the government) seeks the forfeiture of defendant real property, a residence, commonly known as 11869 Westshore Drive, Putnam Township, Livingston County, Michigan on the grounds that it was used to facilitate the

Michigan on the grounds that it was used to facilitate the unlawful processing and distribution of marijuana.[1] Neal Duprie and his wife Kathryn Duprie filed claims to the property. Now before the Court is the government's motion for summary judgment and Neal and Kathryn Duprie's motion to dismiss as to the residence. For the reasons which follow, the government's motion will be granted, the Duprie's motion will be denied and the residence will be forfeited.

II.

A.

1.

In June 1992, following two undercover drug buys, officers from the Livonia Intelligence Bureau and the Livingston and Washtenaw Narcotics Enforcement Team executed a search warrant on 11869 Westshore Drive, Putnam Township. The warrant was issued by a district judge in Livingston County and covered a search of the curtilage and premises of the property including outbuildings, as well as for the person of Neal Leo Duprie, Jr. Seized during the search from the residence were several baggies containing various amounts of marijuana; currency, including currency marked by the Narcotics Enforcement Team and used during the undercover buys; and

---

1. On March 21, 1994 the Court entered two orders. The first granted the government's motion for partial summary judgment and ordered that the parcel of property upon which a pole barn was located be forfeited. The second order granted the Duprie's motion to dismiss the government's forfeiture complaint against a parcel which was undeveloped and was unconnected to drug trafficking.

several guns. Seized from a pole barn on the property was approximately twenty five pounds of marijuana found hidden in a boat.[2]

During the course of the search Neal and Kathryn Duprie drove up to the residence. They were arrested for possession with intent to distribute a controlled substance. In a search of their vehicle incident to their arrest the officers noted that the car smelled of freshly burned marijuana and found three burned marijuana cigarettes and a baggie with a small amount of marijuana in the console. The Dupries were prosecuted under state law.[3] Neal Duprie plead guilty to a felony and received eight months in jail and probation. Kathryn Duprie plead guilty to a ninety day misdemeanor and was fined. The government seized the property on June 17, 1992.

B.

In a September 14, 1993 order, the Court deemed that the Dupries admitted the following: that the property was used by Neal Duprie to traffick in multiple pounds of marijuana, that Neal Duprie sold multiple pounds of marijuana in May and June of 1992 at the property, that a search of the property produced marijuana in the study, the master bedroom, the garage, the guest room, the kitchen, the living room, and in a "fanny pack" along

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2. The government states that the twenty five pounds of marijuana was found in the garage. Defendants state that the twenty five pounds of marijuana was found in the pole barn. The Court assumes that the government uses the terms garage and pole barn synonymously.

3. The statute(s) under which the Dupries were prosecuted and to which they plead are not set forth in the record.

with Kathryn Duprie's driver's license, and that Kathryn Duprie was aware of Neal Duprie's drug trafficking activities in the residence.

III.

Real property, "including any right, title, and interest . . . in the whole of any lot or tract of land and any appurtenances or improvements" is subject to forfeiture if it "is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . ." 21 U.S.C. §881(a)(7). In order to establish that the property is forfeitable, the government must first prove that there is "probable cause to believe that a substantial connection exists between the property to be forfeited and the illegal exchange of a controlled substance." *U.S. v $67,220.00 in U.S. Currency*, 957 F.2d 280, 283 (6th Cir. 1992) (quoting *United States v 526 Liscum Drive*, 886 F.2d 213, 216 (6th Cir. 1989). Probable cause means "reasonable grounds for belief of guilt, supported by less than prima facie proof but more than mere suspicion." *Id.* The burden then shifts to the claimant to prove why the property is not forfeitable. *$67,220.00 in U.S. Currency*, 957 F.2d at 283.

A.

At oral argument held on March 2, 1994, the Court gave the government an opportunity to provide an affidavit from an agent involved in the investigation regarding the connection of the residence to the transaction. The Dupries were given the opportunity to respond. The government has filed an affidavit of Benjamin McDermott (McDermott), a Livonia Police sergeant assigned to the DEA Task Force, and involved in the

investigation of the Dupries. The Dupries have not responded to the affidavit.

1.

The government asserts that it has demonstrated that the property is subject to forfeiture and that the Dupries are unable to show that it is not. It says that the Dupries' admissions that they used the property to sell multiple pounds of marijuana, and their admission that quantities of marijuana were found in the residence and the garage establishes probable cause to believe that a substantial connection exists between the property to be forfeited and the illegal exchange of a controlled substance. Further, McDermott's unrefuted affidavit states that a confidential informant used in the investigation called the Duprie residence twice to arrange for two separate purchases of multiple pounds of marijuana. The confidential informant was instructed by Duprie to come to the residence to complete the transaction. At that time five pounds of marijuana was delivered at a purchase price of $1,650 per pound and the balance of $3,300 owed from the earlier purchase was paid. During the subsequent execution of a search warrant in the residence, McDermott says that $4,800 in cash was found in a desk and $3,300 in recorded police funds was found. In addition, marijuana was found throughout the residence.[4] The government contends that the amounts of marijuana found in the residence was greater than that which would constitute personal use.

2.

The Dupries say that the residence is not forfeitable because

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4. McDermott's affidavit does not quantify the amount of marijuana found in the residence.

only very small amounts of marijuana, consisting of roaches and residue, was found inside the house. The amount found, the Dupries say, is an amount consistent with simple possession for personal use.

B.

The Court is satisfied that the government has met its burden of showing probable cause that the residence was sufficiently connected to drug transactions to render it forfeitable. While the Court notes that the precise amount of marijuana found in the residence is not included in the record, the Affidavit in Support of the Seizure Warrant notes that marijuana was found in a number of places throughout the house and consisted of more than just roaches and residue. In addition McDermott's affidavit shows that the house was used to facilitate at least two multiple pound purchases of marijuana. Since the government met its burden, the burden shifts to the Dupries to show by a preponderance of the evidence that the property was not subject to forfeiture. *United States v 566 Hendrickson Boulevard*, 986 F.2d 990, 995 (6th Cir. 1993).

The Dupries were deemed to have admitted that the property was used in multiple pound drug transactions and money used in the undercover purchase was found in the house. However, the Dupries say that the property is not forfeitable because Kathryn Duprie was not charged with an offense punishable by more than one year in prison as required under 21 U.S.C. §881(a)(7), that only a small amount of marijuana and money was found on the property, and that whether the parcel was substantially connected to the underlying criminal activity creates a question of fact sufficient to defeat the motion for summary judgment.

Appendix D

The Duprie's argument that the property is not subject of forfeiture because Kathryn Duprie plead guilty to a 90 day misdemeanor is not well taken. First, Neal Duprie plead guilty to a state felony charge.[5] Second, had the Dupries been charged federally under 21 U.S.C §841 with distributing or possessing with intent to distribute less than 50 kilograms of marijuana, they could have been subject to a prison term of up to five years under 21 U.S.C. §841(b)(1)(D). Additionally, the government has presented evidence that the residence was used to facilitate at least two multiple pound transactions of marijuana, one transaction occurring within the residence itself. The Dupries have come forward with no evidence or affidavit to refute the government's evidence. Accordingly, they have failed to sustain their burden that residence was not forfeitable.

IV.

The Dupries next claim that if the residence is forfeitable property, the forfeiture of it would constitute cruel and unusual punishment and cite *Austin v United States*, 509 U.S. __, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). The Supreme Court in *Austin* held that civil forfeiture constitutes punishment and is subject to the limitations of the Eighth Amendment Excessive Fines Clause. *Id.* at 505-506. However, the Supreme Court declined to establish a test for determining when a forfeiture is constitutionally excessive. Instead, it held that excessiveness is a determination for the lower courts in the first instance. Some

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5. The Court does not know to what state law felony Mr. Duprie plead guilty. However under Michigan law a person convicted of delivery or possession with intent to deliver marijuana of an amount under fifty grams is subject to imprisonment for not less than one year. M.S.A. §14.15(7401)(2)(a)(iv).

courts have compared the value of the property against the nature of the offense. *United States of America v 429 South Main Street*, 1993 U.S. Dist. LEXIS 19175 (S.D. Ohio 1993); *United States v Borromeo*, 1 F.3d 219 (4th Cir. 1993) (the court must inquired into the proportionality between the value of the instrumentality sought to be forfeited and the amount needed to effectuate the legitimate purposes of the forfeiture). Justice Scalia, in his concurrence in *Austin* suggests that the proper inquiry is "whether the confiscated property has a close enough relationship to the offense".

1.

Under a Scalia analysis, the Court is satisfied that the residence has a close enough relationship to the offense. The evidence in the record shows that the residence was used to facilitate at least two drug sales in short span of time. Additionally, the Court is satisfied that the record supports the conclusion that the house was used as the "sales office" in which sales of marijuana were arranged, whereas the pole barn was used as the "warehouse", to store the marijuana.

2.

Under a value analysis, the Court is also satisfied that the record supports the conclusion that the forfeiture is not excessive. The Dupries say that the residence is valued somewhere between $85,000 and $105,000. They assert that less than a few grams of marijuana was found in the residence. Under Michigan law, the maximum fine for the misdemeanor offense of possession of a few grams of marijuana is $1,000. M.C.L.A. §333.7403. The Dupries say that even under the felony provision, the maximum fine is only $2,000. M.C.L.A.

§333.7401. The Dupries argue that the forfeiture of property with a value of at least $80,000 where the fine is at most $2,000 is clearly excessive and violates the constitution.

The government responds that the Dupries, had they been charged federally under the Controlled Substance Act, 21 U.S.C. §841(b)(1)(D), could have faced a maximum fine of $250,000. The government relies on *United States v Property at 38 Whalers Cove*, 954 F.2d 29 (2nd Cir. 1992) in which the Court of Appeals for the Second Circuit affirmed the forfeiture of a condominium valued at $145,000 in which drugs with a value of $250.00 was sold.

3.

Initially the Court notes that the 1991 State Equalized Value of the house was $31,770. The government's appraisal of the house was $85,000. McDermott, in his affidavit, stated that Duprie sold the marijuana in the two undercover transactions at a price of $1650 per pound which is a wholesale price. The retail price or "street value" ranged from $125 per ounce to $175 per ounce. Thus, the retail value of the thirty two pounds of marijuana involved, twenty six pounds stored in the pole barn and six pounds involved in transactions, ranged from $64,000 to $89,000. A significant amount of marijuana with a substantial value was involved here. In addition, had the Dupries been charged federally, they could have been subject to fines of $250,000. Forfeiture of the house is the functional equivalent of, at most, a fine of $85,000. The Court is satisfied that forfeiture of the house does not constitute an excessive fine.

Appendix D

IV.

For the reasons stated above, the government's motion for summary judgment is GRANTED. The government shall present an appropriate form of judgment.

SO ORDERED.

s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: APR 05 1994

Detroit, Michigan

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION DATED SEPTEMBER 14, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 92 CV 73383 DT

Honorable Avern Cohn

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN REAL PROPERTY LOCATED AT 11869 WESTSHORE DRIVE, PUTNAM TOWNSHIP, LIVINGSTON COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES,

Defendant.

ORDER TO COMPEL ANSWERS TO THE UNITED STATES' INTERROGATORIES AND DOCUMENT REQUESTS AND TO DEEM UNANSWERED REQUESTS FOR ADMISSIONS AS ADMITTED

This matter having come before this Court pursuant to the Stipulation of the parties regarding the United States of America's Motion to Compel Answers to Interrogatories and Document Requests and to Deem Unanswered Requests for

Appendix E

Admissions as Admitted, and this Court having reviewed that Stipulation and and being otherwise fully advised in the premises,

IT IS HEREBY ORDERED THAT:

1). The deposition of Claimants Neal and Kathryn Duprie has been scheduled to take place on September 22, 1993 at the offices of the U.S Attorney at 2 p.m.

2). Claimants' shall file full responses to the United States of America's Interrogatories and Document Requests no later than September 17, 1993.

3). It is further stipulated that the United States' Requests for Admissions are hereby deemed admitted and may be used for any and all purposes under the Federal Rules of Civil Procedure and Evidence.

s/ AVERN COHN
HONORABLE AVERN COHN

Dated: SEP 14 1993

Supreme Court, U.S.
FILED
AUG 0 7 1996
OFFICE OF THE CLERK

(2)

No. 95-1828

In the Supreme Court of the United States

OCTOBER TERM, 1995

CERTAIN REAL PROPERTY LOCATED AT 11869 WESTSHORE DRIVE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

13 pp

QUESTION PRESENTED

Whether the civil forfeiture under 21 U.S.C. 881(a)(7) of real property that was used to facilitate multiple drug transactions satisfied the Excessive Fines Clause of the Eighth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1828

CERTAIN REAL PROPERTY LOCATED AT 11869 WESTSHORE DRIVE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-20a) is reported at 70 F.3d 923. The memorandum and order of the district court (Pet. App. 29a-38a) is reported at 848 F. Supp 107.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1995. A petition for rehearing was denied on January 24, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on April 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Eastern District of Michigan, the government filed a civil forfeiture complaint pursuant to 21 U.S.C. 881(a)(7) against the real property located at 11869 Westshore Drive, Putnam Township, Livingston County, Michigan, the residence of Neal and Kathryn Duprie.[1] The district court granted the government's motion for summary judgment and ordered forfeiture of the property to the government. Pet. App. 29a-38a. The court of appeals affirmed. *Id.* at 3a-20a.

1. In April 1992, the Livonia Police Department received information that Neal Duprie was a marijuana dealer. The police made a controlled purchase of marijuana from Duprie where he worked. Thereafter, a confidential informant purchased multiple pounds of marijuana from Duprie on the curtilage of Duprie's property. Based on the purchases at Duprie's work and at his residence, the police obtained a search warrant for two lots owned by the Dupries, one containing their house and another a pole barn. Pet. App. 4a.

From the residence, the police seized undetermined amounts of marijuana (found in the study, master bedroom, the guest room, the kitchen, and the living room), $8,380 in cash (which included some of the

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[1] Section 881(a)(7) subjects to forfeiture to the United States "[a]ll real property * * * which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

money used in the controlled purchases), and several weapons. They also seized from a "fanny pack" some marijuana and Kathryn Duprie's driver's license. From the pole barn, the police seized approximately 25 pounds of marijuana. Pet. App. 5a-6a, 31a-32a. The Dupries were arrested and prosecuted in state court. Neal Duprie was sentenced to eight months' imprisonment; Kathryn Duprie received a fine. *Id.* at 6a.

On June 17, 1992, the United States instituted a civil forfeiture action against the properties containing the residence and pole barn, and the Dupries filed a claim to the property. Following discovery, the government moved for summary judgment. As part of its case, the government presented unrebutted evidence that a confidential informant twice called the Duprie residence to arrange for two separate purchases of marijuana; that Neal Duprie instructed the informant to come to the residence to complete the sale; that at the time of the sale at the residence, the informant bought from Duprie five pounds of marijuana at $1,650 per pound, and also paid Duprie $3,300 for the earlier purchase at Duprie's place of employment. Pet. App. 4a, 6a-8a, 32a-33a.

2. The Dupries moved to dismiss the forfeiture action as to the residence. They relied on *Austin* v. *United States*, 509 U.S. 602 (1993), which held that the Eighth Amendment's Excessive Fines Clause applies to forfeiture proceedings under Section 881(a)(7). Pet. App. 30a, 35a.[2] The district court denied the motion to dismiss, granted summary judgment for the government, and ordered the forfeiture of the pro-

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[2] The Dupries conceded that the pole barn was forfeitable and challenged only the forfeiture of the residence. Pet. 5; Pet. App. 7a.

perty. *Id.* at 21a-38a. The district court noted that *Austin* had declined to establish a test for determining when a forfeiture is constitutionally excessive, instead leaving the question open for "lower courts" to "determin[e] * * * in the first instance." *Id.* at 35a; see also 509 U.S. at 622-623. The district court then observed that, after *Austin*, some courts had adopted a "proportionality" test that compared the value of the property with the nature of the offense, whereas other courts, following Justice Scalia's concurring opinion in *Austin*, had employed an "instrumentality" test that considered whether the forfeited property was sufficiently related to the offense to render the property forfeitable. Pet. App. 36a.[3]

The district court concluded that the forfeiture of the Duprie's property satisfied both tests. The court reasoned that the forfeiture satisfied the "instrumentality" test endorsed by Justice Scalia, because the record showed "that the residence was used to facilitate at least two drug sales in [a] short span of time," and that "the house was used as the 'sales office' in which sales of marijuana were arranged, whereas the pole barn was used as the 'warehouse', to store the marijuana." Pet. App. 36a.

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[3] In *Austin*, Justice Scalia stated that the test under the Eighth Amendment should be "not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense." 509 U.S. at 628 (concurring opinion). The majority in *Austin* responded by stating that "[w]e do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture * * * was excessive." 509 U.S. at 623 n.15.

The district court held that the forfeiture also complied with the "proportionality" test that considered the value of the forfeited property. Under that test, the court reasoned that the government appraised the value of the house at $85,000 and the Dupries had valued their house between $85,000 and $105,000. The court also found that "the retail value of the thirty-two pounds of marijuana involved, twenty-six pounds stored in the pole barn and six pounds involved in transactions, ranged from $64,000 to $89,000." Pet. App. 36a-37a. The court concluded that "had the Dupries been charged federally, they could have been subject to fines of $250,000," and that "[f]orfeiture of the house is the functional equivalent of, at most, a fine of $85,000." *Id.* at 37a.

3. The court of appeals affirmed. Pet App. 3a-20a. The court held that the district court had conducted an "appropriate analysis to determine whether the forfeiture of the house would be a violation of the Eighth Amendment." *Id.* at 20a. The court of appeals reasoned that the district court had determined that "the house was an instrument of the Dupries' marijuana trafficking" and, thus, "the district court properly found a 'nexus' between the Dupries' illegal activities and the house located on the Property." *Id.* at 19a. The court of appeals also concluded that the value of the house was commensurate with the value of the marijuana involved in the case, and that the value of the house did not exceed the potential $250,000 fine that would have applied had the owners been charged with a federal offense. *Id.* at 19a-20a. The court of appeals noted that "[s]ince the *Austin* decision, no single test has been universally accepted by the federal judiciary" to determine whether an *in rem* forfeiture violated the Eighth Amendment, *id.* at

10a, and stated that it likewise would not establish a single test for the Sixth Circuit "because of the factually intensive nature of these types of cases." *Id.* at 20a.

ARGUMENT

Petitioner contends that the Court should grant certiorari in this case "to resolve a growing split" in the circuits concerning the appropriate test to determine whether an *in rem* forfeiture violates the Excessive Fines Clause of the Eighth Amendment. Pet. 6. Courts of appeals have applied differing tests to assess the validity of civil forfeitures under the Eighth Amendment. This is not the appropriate case to establish a definitive test, however, because petitioner would not be entitled to relief under any test. Indeed, the petition neither urges this Court to adopt a particular test nor suggests that application of a particular test would yield a result different from the decisions below. Accordingly, further review is unwarranted.

In considering whether an *in rem* forfeiture violates the Excessive Fines Clause, two courts of appeals have applied a multi-factored test that combines instrumentality and proportionality concepts. The Second Circuit in *United States* v. *All Right, Title Interest in Real Property*, 77 F.3d 648 (1996), listed the following relevant factors:

> (1) the harshness of the forfeiture (*e.g.* the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the

> property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.

Id. at 659 (quoting *United States* v. *Milbrand*, 58 F.3d 841, 847-848 (2d Cir. 1995)). Similarly, the Ninth Circuit in *United States* v. *6380 Little Canyon Road*, 59 F.3d 974 (1995), has adopted a threshold instrumentality test, followed by a proportionality test that compares the worth of the property to the culpability of the owner under the following criteria:

> (1) the fair market value of the property;
> (2) the intangible, subjective value of the property, e.g. whether it is the family home; and
> (3) the hardship to the defendant * * *
>
> [and]
>
> (1) whether the owner was negligent or reckless in allowing the illegal use of his property; or
> (2) whether the owner was directly involved in the illegal activity, and to what extent; and
> (3) the harm caused by the illegal activity, including (a) * * * the amount of drugs and their value, (b) the duration of the illegal activity, and (c) the effect on the community.

Id. at 985-986.[4]

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[4] Although not deciding the issue, the Third and Eighth Circuits have suggested that they would adopt a test that combines both proportionality and instrumentality elements. *United States* v. *RR #1, Box 224*, 14 F.3d 864, 873-876 (3d Cir. 1994); *United States* v. *9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir. 1994).

In contrast, in *United States* v. *Chandler*, 36 F.3d 358, 362-366 (1994), cert. denied, 115 S. Ct. 1792 (1995), the Fourth Circuit, relying on Justice Scalia's concurring opinion in *Austin*, held that an instrumentality test is the principal factor in determining whether an *in rem* forfeiture satisfies the Eighth Amendment. *Chandler* reasoned that "[t]he question of excessiveness is * * * tied to the 'guilt of the property' or the extent to which the property was involved in the offense, and not its value." 36 F.3d at 364. The Fourth Circuit concluded that the instrumentality test should consider three factors:

> (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can be readily separated from the remainder.

Id. at 365. Conversely, the Eleventh Circuit has held that a proportionality test alone should determine whether an *in rem* forfeiture is constitutionally excessive. *United States* v. *427 and 429 Hall Street*, 74 F.3d 1165, 1170 (1996).

The differing approaches that the courts of appeals have adopted do not call for this Court's review in this case. Under any of the above tests, the forfeiture of the Dupries' residence comports with the Eighth Amendment. The forfeiture satisfies an instrumentality test because the property was closely related to the illegal drug activity. The house was used as a sales office to arrange for multiple deals of multiple-pounds of marijuana, while the pole barn was used to store marijuana. The total quantity of marijuana involved was 32 pounds. In sum, the owners used the

residence as an integral part of an extensive marijuana trafficking business.

The forfeiture also was constitutional under a proportionality test. The impact of the forfeiture was commensurate with the culpability of the owners. The value of the property ranged from $85,000 to $105,000; the value of the 32 pounds of marijuana involved in this case was $64,000 to $89,000. Both owners were convicted of a drug offense in state court, which demonstrated that they knowingly used the property to facilitate their drug business. See also Pet. App. 32a (district court's noting owners' admissions of "drug trafficking activities in the residence"). If the owners had been convicted of federal drug crimes, they could have been fined up to $250,000. See 21 U.S.C. 841(b)(1)(D) (authorizing a fine of $250,000 for an offense involving less than 50 kilograms of marijuana). Other circuits employing a proportionality test have upheld similar forfeitures. See *United States* v. *All Right, Title Interest in Real Property*, 77 F.3d at 659 (upholding forfeiture of realty in which owner had interest of up to $500,000 where value was at most one-fourth of potential fine under federal drug laws); *United States* v. *427 and 429 Hall Street*, 74 F.3d at 1172-1173 (upholding forfeiture of property worth $65,000 because owner could have faced fine of $40,000 and owner was found with marijuana, cash, a weapon, and near a school). Moreover, because the forfeiture was constitutional under the instrumentality and proportionality tests, it also was constitutional under a combination of these tests.[5]

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[5] Further review may also be premature because courts of appeals have not yet had the opportunity to consider two

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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recent cases of this Court concerning the constitutionality of civil forfeitures, *Bennis* v. *Michigan*, 116 S. Ct. 994 (1996), and *United States* v. *Ursery*, No. 95-345 (June 24, 1996). *Bennis* rejected the claim that an innocent owner has a due process defense to the forfeiture of property that "facilitated and was used in criminal activity." 116 S. Ct. at 1001. *Ursery* held that a civil forfeiture under 21 U.S.C. 881(a)(7) following a criminal conviction did not violate the Double Jeopardy Clause. *Ursery*, slip. op. 24-25. Although neither *Bennis* nor *Ursery* addresses the Excessive Fines Clause, the decisions could have some implications for this Clause. See, *e.g.*, *Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting) (stating that the majority opinion was "dramatically at odds" with *Austin*, and suggesting that *Bennis* rendered owner's blameworthiness and the property's value irrelevant to an Eighth Amendment challenge).